Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Dr. ALVIN KANOFSKY , PhD. - PETITIONER-APPELLANT

Vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE

RESPONDENT-APPELLEE

MR.MICHAEL MUKASEY – ATTORNEY GENERAL

Mr. RICHARD FARBER, ESQ.
Mr. JOHN SCHUMANN, ESQ.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS FOR CASE 07-1860 IN PHILADELPHIA

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INTRODUCTION

Appellant claims that he engaged in business activity during the period from 1996-2000.

He pursued real estate development, high technology research and development, high technology consulting, whistle blowing activity, and starting up independent businesses.

He was thwarted in this activity by various entities – operating under color of law, such as various non-profits in the area, and city and state agencies.

The IRS after examining the various tax returns for this period determined that there were substantial deficiencies for the first three years, but small deficiencies for the last two years. Kanofsky's activities were essentially identical for the entire period.

Kanofsky appealed these deficiencies to the Tax Court and a trial was held on March 15 of 2005. He was denied motions to delay the trial to present additional witnesses who would testify as to the thwarting of his activities and the fraud and corruption present. As well, he made numerous affirmative defense claims of fraud and corruption, all of which the court ignored.

As well, the IRS attorneys and the Tax Court blocked his presenting evidence of his business activity, citing primarily the 14 day rule set by the court. This was in

spite of Kanofsky presenting voluminous documents for evidence well before the 14 day cutoff period, and then finally presenting `the winnowed down documents just within the 14 day cutoff period. The Tax Court, after some minor adjustments ruled against Kanofsky's claims of being in business for the period during the first three years, but allowed that he was in business in the last two years. The court, as well, totally disregarded his claims of fraudulent and corrupt entities blocking his activity, and any affirmative defenses. In most instances, the court supported the IRS claims because of lack of evidence – the documents it refused to allow in. Also, the witnesses that Kanofsky wanted to call to support his claims.

As well, the court would not allow Kanofsky's motion to open the records of the UPS case for income tax evasion – the largest IRS case to date and one which had been settled. Kanofsky wanted to open the UPS records because one of the main entities blocking Kanofsky's activities is Ms. Marlene (Linny) Fowler, whose father and Uncle were head of UPS during the period under IRS consideration.

As well, there were additional documents, of new matter further supporting Kanofsky's contention of Fraud and Corruption, as for example cases against local and Philadelphia entities and individuals for fraud and corruption involving government activities.

With Regard to the Whistleblowing activity, Kanofsky presented numerous instances of fraud and corruption where whistleblowing was valid. The most

prominent instance is the case of the University of Medicine and Dentistry of New Jersey (UMDNJ), where Kanofsky was the first and most visible whistleblower in pursuing a Federal Case against UMDNJ (Eventually, Supreme Court Case 02-01818) for discharging his older brother who was in charge of monitoring the billing records of UMDNJ. After many years of litigation, in the new matter, UMDNJ was finally indicted by the FBI and Department of Justice and accepted a Plea Agreement of Deferred Prosecution, where Judge Herbert Stern was installed as a monitor of the University's activities over a two year period. This is the largest fraud and corruption case ever of a university in this country.

In post trial motions and submissions Kanofsky tried repeatedly to have the denied evidence entered into the record, as well as new matter which further supported his claims of fraud and corruption. This material was finally accepted as part of his Motion for Reconsideration of the decision, but it certainly was not considered by the court. As well, the initial IRS attorney, Mr. Jackson, for the case apparently left the IRS service, presumably for malfeasance. Eventually, the court ruled against Kanofsky on November of 2005.

Kanofsky appealed this ruling to the Third Circuit Court of Appeals, even citing new instances of fraud and corruption by private and public entities. The Appeals court nevertheless once more ruled against Kanofsky, and then denied En Banc his Petition for Reconsideration of the ruling. The court ruled that Kanofsky had not presented

any evidence to support his claims, and that he lacked credibility. (and had even made incendiary claims). This is now an appeal from that ruling.

In the period from the when the appeals court denied Kanofsky's appeal to the present, the entire state democratic party apparatus including several legislators, have been indicted for fraud and corruption. It is worth noting that the head of the state democratic party T.J. Rooney resides and works in Bethlehem, and that Governor Rendell has numerous personal and political ties to Bethlehem. Among many other fraudulent and corrupt activities were those of State Senator Vincent Fumo, the most powerful politician in the legislature who was indictedfor fraud and corruption, and the granting of a state gambling license to an alleged Scranton, PA mafia figure, Mr. Louis De Naples, despite numerous earlier protestations of his having ties to organized crime.

QUESTIONS RAISED

1.Are Kanofsky's affirmative defense claims valid, but are being disregarded by the court?

Kanofsky is citing fraud and corruption and thwarting of his activities by local non profits and government agencies, as reasons for his reduced business activity. Criminal activities such as extortion and bribes are apparently a large part of business activity as indicated in reports and litigation in Philadelphia and New York areas. The court, by its total disregard of Kanofsky's claims, apparently accepts these activities as normal business practices , thereby limiting business participants to those engaged in criminal illegal activities, thus severely limiting and biasing the pool of participants. As well, this has a impact on the development of neighborhoods and communities in this country. This has enormous legal and public policy ramifications.

2. Should Kanofsky's evidence be allowed – should the IRS attorneys be sanctioned for blocking and intimidating Kanofsky?

Kanofsky was originally deceived by the IRS attorney, Jackson, into believing that the court would accept his winnowed down evidence, even though it was presented within the 14 day period. As well the IRS attorney engaged in activities to prevent his preventing evidence on the day of the trial, such as occupying Kanofsky with other

activities, etc.

Eventually, Attorney Jackson left the service of the IRS, presumably for malfeasance and further improper activities. Kanofsky proposed impeaching Attorney Jackson Shortly after this, he left the service of the IRS. This has tremendous legal and public policy aspects.

3. Why are two years of his activity accepted as business activity while the other three years aren't

Nothing was different in Kanofsky's activities other than his neglecting to put the location of his main place of business on the top of the form, as stated as the reason by Attorney Jackson. This should be considered as a harmless error. This has enormous legal and public policy aspects.

4. Why aren't his claims of whistle blowing, high tech research and development, consulting, real estate development, etc. accepted as business activity?

The appellant was the first and major whistleblower in the UMDNJ case, which eventually led to UMDNJ being put under the supervision of a Federal Judge, Judge Herbert Stern. The appellant engaged in numerous research and development projects for profit, including working with the Department of the Navy, NASA, and the Department of Energy – yet the court totally disregarded this research work, the appellant owns the major real estate property next to Lehigh University and Bethlehem Steel, and yet the court totally disregarded his efforts to

develop and profit from the use of this property. He made numerous efforts and had numerous activities to develop and consult with companies.

Yet despite all of these business activities, the court totally disregarded these.

5. Does the courts' total disregard of the affirmative defense of criminal activity promote the activity and prevent honest people from developing their businesses? For Example, does this promote blight and decay in inner city areas.

The appellant encountered numerous corrupt and fraudulant activities, and his refusal to pay bribes and be extorted was totally ignored by the court. This lack of recognition of criminal activity by those involved supposedly in business promotion and development is what has resulted over the years in blight within our inner cities, and depressed the economy by discouraging business development.

6. In Kanofsky's requesting witnesses to testify as to the thwarting of activity by the local entities, the court blocked such witnesses. Kanofsky presented a motion to the Tax Court to hear testimony from such witnesses. Motion was denied.

Kanofsky made a motion to present witnesses who could testify on his behalf as to the criminal activities and thwarting of Kanofsky's and their own activities. Yet

the court denied his motion and attempts to present such witnesses.

7. Did the court ignore possible contributors and enablers to 9/11 activity? Again blocking discovery on this by not scheduling witness testimony, thus enabling the terrorists, operating under color of law, conspiracy, Rico, and retaliating for Whistle Blowing for exposing fraud and corruption

Has the court, by its actions enabled the 9/11 activity, and have they operated under color of law as well as conspiring to do so. Also, thave they retaliated against the appellant for whistle blowing and exposing fraud and corruption? The 9/11 Evidence that would have been presented by Kanofsky points to Lehigh Valley Entities exciting and encouraging the Arabs to resist Israel and have the Intifada and terrorist operations such as 9/11.

8. Court Blocked UPS case discovery, one of the biggest tax court cases ever. One of the principal entities blocking Kanofsky's activities, are Ms. Linny Fowler and Dr. Beall Fowler, a fellow Lehigh Univ. Physics Professor. Ms. Fowler's father and uncle the Oberkotters, were the heads of UPS during the period of the UPS actions under trial. Again, Kanofsky presented a motion on this, and this was denied by the court.

Ms. Linny Fowler, wife of one of the Physics Department faculty Prof. Bealle Fowler , is one of the

heirs of the UPS fortune. She is one of the principal philanthropists of the Lehigh Valley and is partnered with Mr. Jeffrey Parks, the appellant's next door neighbor, in running Musicfest and Artsquest , the main music and arts festival in Pennsylvania.

The Fowlers and the Parks have opposed the appellant's activity for several decades. The Fowlers and Mr. Parks are close friends with the governor.

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APPENDIX C (SUPPLEMENT) – Tax Court Opinion-memorandum, April 18, 2006

JURISDICTION

A Tax Court Order for Tax Deficiency, on case Docket No.12547-04 was rendered on the case on November 17, 2006. The notice of appeal was filed in March 16, 2007 by the appellant, with the Third Circuit Court of Appeals, which later issued a notice that there was a question as to whether the appeal was timely filed. Kanofsky then filed supporting documents in April 2007 to argue that the appeal was filed within the 90 day period from when his Motion to Vacate or Reconsider Decision filed December 18,2006 was denied.

After a period of delay, due to supposed concerns over whether the appeal was timely filed, the Court of Appeals finally set a schedule in July for the submission of briefs., leaving the decision on timely filing to the Court. The appellant then filed an Informal Brief along with supporting documents to the Third Circuit Court of Appeals on August 14, 2007. The opposing party filed a reply brief two weeks after their originally set deadline , with Kanofsky filing a reply brief on October 15, 2007.

The Court Three Man Appeals Panel did rule that the appeal was timely filed, and they rendered a decision affirming the decision of the Tax Court on April 1, 2008 In this decision, the Court ignored many of Kanofsky's claims in the affirmative defense and business activity.

Kanofsky then petitioned for a en-banc rehearing on this decision on May 16, 2008. This Petition was denied by the court en banc on June 4, 2008. This is now an appeal from that final decision of the Third Circuit court of Appeals.

CONSTITUTIONAL AND OTHER STATUTORY CONSIDERATION

TABLE OF AUTHORITIES

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383 U.S. 687 (1966)

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93 T.C. 684 (1989)

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889 F. 2d 1548 (6ty Cir. 1989)

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319 U.S. 590 (1943) - Also Cited by Appeals Court

Jackson v. Commissioner,
864 F. 2d 1521 (10thy Cir. 1989)

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Court

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106 F. 3d 1445 (9th Cir. 1997)

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Malmstedt v. Commissioner,
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Moretti v. Commissioner,
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National Starch and Chemical Corp. v. Commissioner
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Polack v. Commissioner,
366 F. 3d 608 (8th Cir. 2004)

Prof. Ins. Agents of Michigan v. Commissioner
726 F. 2d 1097 (6th Cir. 1984)

Richmond Television Corp. V. United States, - Cited by

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752 F. 2d 341 (8th Cir. 1985)

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674 F. 2d 1359 (10th Cir. 1982)

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Statutes and Regulations:

18 U.S.C. Sec. 242
18 U.S.C. sections 1961-68

Internal Revenue Code (26 U.S.C.)

Sec. 162 (a)

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Sec. 7442
Sec. 7482
Sec. 7483
Sec. 7453

Sec. 7491(a)(1)
Sec. 7502(a)

Treas. Reg. (26 C.F.R.):

Sec. 1.183.2(b)

Miscellaneous:

Federal Rules of Appellate Procedure:
Rule 13(a) (2)

Federal Rules of Evidence:
Rule 801(c)
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Rule 803
Rule 804

Tax Court Rules:

Rule 104(c)(2)
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Rule 142(a)
Rule 162
Rule 162

FROM APPEALS COURT DECISION

Also Citing

INDOPCO, Inc. v. Comm'r 503 I/S/. 79, 84 (1992)

Old Chief v. United States. 519 U.S. 172, 174 n.1 (1997)

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Whipple v. Comm'r, 373 U.S. 193, 202 (1963)

RICO, Retaliation for Whistle-blowing, Enabling statute, Under Color of Law, Violation of Civil Rights, Enabling Statute U.S.C. 18 2(b)
Kanofsky et al. vs. University of Medicine and Dentistry of New Jersey, et al 02-01818

Kanofsky and Kanofsky vs. Stark and Stark 06 -01654

EEOC case – Kanofsky vs. Lehigh University No. 530-2007-01356N

Acting under Color of Law 18 U.S.C. 242

STATEMENT OF CASE

Introduction:

Appellant claims that he engaged in business activity during the period from 1996-2000. He pursued real estate development, high technology research and development, high technology consulting, whistle blowing activity, and starting up independent businesses. He was thwarted and retaliated against in this activity by various entities – many operating under color of law, such as various non-profits in the area, and city and state agencies.

The IRS after examining the various tax returns for this period determined that there were substantial deficiencies for the first three years, but small deficiencies for the last two years. Kanofsky's activities were essentially identical for the entire period.

Kanofsky appealed these deficiencies to the Tax Court and a trial was held in March of 2005. He was denied bringing additional witnesses who would testify as to the thwarting of their own activities and the fraud and corruption present, as requested in his motions. As well, he made numerous affirmative defense claims of fraud and corruption.

As well, the IRS attorneys and the Tax Court blocked his presenting evidence, citing primarily the 14 day rule.

This was in spite of Kanofsky presenting voluminous documents for evidence well before the 14 day cutoff period, and then finally presenting the winnowed down documents just within the 14 day cutoff period. The Tax Court, after some minor adjustments ruled against Kanofsky's claims of being in business for the period during the first three years, but allowed that he was in business in the last two years. The court, as well, totally disregarded his claims of fraudulent and corrupt entities blocking his activity, and any affirmative defense. In most instances, the court supported these claims because of lack of evidence – the documents which they refused to allow in. Also, the court denied testimony from witnesses that Kanofsky wanted to call to support his claims of thwarting activity and fraud and corruption. As well, the court would not allow Kanofsky's motion to open the records of the UPS case for income tax evasion – the largest case to date. Here the main entity blocking Kanofsky's activities is Marlene (Linny) Fowler, whose father and Uncle were head of UPS during the period under consideration.

As well, there were additional documents, of new matter further supporting Kanofsky's contention of Fraud and Corruption, as for example cases against local and Philadelphia entities and individuals for fraud and corruption involving government activities.

With Regard to the Whistle blowing activity, Kanofsky presented numerous instances of fraud and corruption where whistle blowing was valid. The most prominent instance is the case of the University of Medicine

and Dentistry of New Jersey(UMDNJ), where Kanofsky was the first and most visible whistleblower in pursuing a Federal Case against UMDNJ for discharging his older brother who was in charge of monitoring the billing records of UMDNJ. In the new matter, UMDNJ was finally indicted by the FBI and department of Justice and accepted a Plea Agreement of Deferred Prosecution, where Judge Herbert Stern was installed as a monitor of the University's activities over a two year period. This case was previously submitted to the Supreme Court (02-01818 Kanofsky et al vs. UMDNJ et al.)for its consideration, but a Petition for a Writ of Certiorari by the court was denied. A later related case was also submitted (06—01654, Kanofsky and Kanofsky vs. Stark and Stark), but was also denied.

In later motions, Kanofsky tried repeatedly to have the evidence entered into the rec. rd, and finally, it was accepted as part of his Motion for Reconsideration of the Decision, but it certainly was not considered by the court.

Kanofsky appealed the Tax Court ruling to the Third Circuit Court of Appeals. This court ruled against Kanofsky, and then denied En Banc his Petition for Reconsideration of the ruling. The court ruled that Kanofsky had not presented any evidence to support his claims, and that he lacked credibility.(and had even made incendiary claims – of organized crime and homosexual dominance of the area?). This is now an appeal from that ruling. The case , the court claimed, presented by Kanofsky was based on just whether he was in business and whether he had presented evidence to that effect. In fact Kanofsky had made

numerous other claims, based on his being active in whistle blowing, affirmative defenses, etc.

In the time period from when Kanofsky submitted his appeal to the court of Appeals to when the Appeals Court finally ruled on the case, numerous additional instances of Fraud and Corruption have occurred. We list some of the most prominent:

1. The Louis DeNaples Case where the Owner applicant of one of the casinos in Pennsylvania, Mount Airy Lodge, was indicted for Fraud and Corruption, Perjury, etc. in his application, where he testified that he had no connection to Organized Crime in the Scranton area. In fact, he is one of the major figures in Organized crime, and this fact was hidden from the Casino Licensing Commission by the state and political figures.

2. Senator Vincent Fumo, the main Democratic Legislative Leader was indicted for fraud and corruption for extortion and improper activities with his non-profits, etc. His trial is scheduled for the Fall. He has stepped down as the Democratic Senate Leader. Fumo had earlier been responsible for secretly placing over $100 M in the state budget to move the Barnes Foundation in Merion, Montgomery County, to Philadelphia. The action against the Barnes to thwart its survival in Merion is similar to the concerted action against

the appellant. In fact, the head the board of trustees of the Philadelphia Museum of Art, the main proponent of moving the Barnes, (the Bermans) was one of the members of the board of Trustees of Lehigh University.

3. Most recently, the democratic state caucus leaders in Harrisburg were indicted for using taxpayer money and time to campaign for Democratic candidates in the state. This case involves numerous elected and appointed officials of the Democratic Party. The Democratic party leader, T.J. Rooney is located in Pennsylvania with his office only a block from the Appellant. Democratic party members have made numerous efforts to close down Kanofsky's activities.

4. Also, the head of the Allentown symphony orchestra, Lou Pavledes, of which the local entities are major patrons, was indicted by the FBI for illegal activities of taking bribes from a contractor in Detroit.

5. A former prominent Lehigh Valley Business Man and the head of the Leonard Pool Health Care Trust of the local Lehigh Valley Hospital, William P. Ferretti, has been indicted for running a prostitution ring out of Pheonix, Arizona.

Again, in these cases, and numerous others not mentioned and previously mentioned in papers filed earlier, the evidence of the underlying organized crime activities in the state and its communities is evident.

To move things forward in trying to advance his activities, Kanofsky filed a Federal EEOC complaint against Lehigh University for age and religious discrimination(Case no. 530-2007-01356N)). Immediately after this was filed, the city sent a notice to Kanofsky that his building had violations and that they wanted entry. They subsequently forced entry and condemned the building, using a Administrative Search Warrant with numerous false claims. Kanofsky worked with the city inspector to eliminate all of the so called violations, but he did file a retaliation complaint against Lehigh University for their promoting the condemnation.

Some of the new matter was submitted to the courts in the original Tax Court Pleadings, to the Third Circuit Appeals Court and for its the Petition for review. The Tax Court and the Appeals Court have consistently ignored the new matter .

As stated above, in the period from the when the appeals court denied Kanofsky's appeal to the present, the entire state democratic party apparatus including several legislators, have been indicted for fraud and corruption. It is worth noting that the head of the state democratic party T.J. Rooney resides and works in

Bethlehem, and that Governor Rendell has numerous personal and political ties to Bethlehem and to Ms. Marlene (Linny) Fowler and Mr. Jeffrey Parks. Among other fraudulent and corrupt activities was the granting of the state Gambling License to a known mafia figure, Louis De Naples, despite numerous protestations of his having ties to organized crime.

REASONS FOR GRANTING THE WRIT

1. **The court should recognize Kanofsky's affirmative defense claims as valid.** Allowing fraud and corruption to run rampant, destroys a democratic government. This has a tremendous societal impact, since it means that only companies that co-operate with organized crime can establish themselves, and eliminates those companies that operate honestly. This case has enormous public policy and legal aspects

2. **The Court should recognize Kanofsky's whistle blowing claims as valid, and as a valid for profit activity.** Whistle blowing is recognized as a valid and protected activity. The government is retaliating for Kanofsky being a whistleblower, and retaliation is forbidden by law.This case has enormous public policy and legal aspects.

3. **The court should allow Kanofsky's evidence – since to not allow it in is a grave miscarriage of justice.** The court overstepped and exceeded its discretion by not allowing the evidence submitted by Kanofsky

in. As well, it should allow the introduction of new matter supporting the appellant's claims of fraud and corruption. The court erroneously states in their decision –

"The Court also did not err in denying Kanofsky's additional submissions which constituted inadmissible hearsay (handwritten notes and calculations)." As presented here, that was not the major part of the additional submissions.Again the inclusion of new material relevant to a case is provided by law. This case has enormous public policy and legal aspects.

4. **The court should recognize that the non-profits apparently work closely with organized crime to thwart any activity by honest-dealing companies.** Again, the court protects the non-profits and the criminal elements .The non-profits block economic development and activity since they rely on blight and poverty for a means to expand their physical plant and for government support.

   For example, the HUD grants usually go to non-profits which supply services to the impoverished areas. If there were no such areas, the federal funds would not be available. This case has enormous public policy and legal aspects, and a decision in favor of the appellant

would have a tremendous impact on economic development and inner city poverty. Thus, this case has enormous public policy aspects.

5. **The court should recognize that the local non-profits and other entities worked to support the intifada prior to 9/11, thwart Jewish and Israeli attempts at peace , and thus lent support to and helped enable the terrorist attacks.** The court attempted to suppress any evidence from witnesses testifying in support of these claims.

   The appellant had a list of witnesses that would have testified as to the local non-profits thwarting activity of Jews in Bethlehem and in the Middle East. The court denied the appellant the opportunity to present these witnesses. A ruling for the appellant would have enormous impact on peace in the middle east, and enormous public policy effects.

6. **The court denied the appellant the opportunity to review the UPS case – the largest Tax Fraud case ever prosecuted. The appellant's main antagonists, the Fowlers were the ones taking a major part in blocking the activities of the**

appellant. The wife, Linny Fowler is the daughter and niece of the former heads of UPS, the Oberkotters, at the time the fraud was perpetrated. The case has enormous public policy and legal aspects. As well, this case apparently opened the way for numerous other U.S. companies to operate off-shore, thereby eliminating paying their fair share of U.S. Taxes. Needless to say, a favorable ruling for appellant in this case this would have a major impact on the United States, and would be a major benefit to many of the small businesses and individuals which are carrying the major tax burden. Thus, this case has enormous public policy and legal aspects.

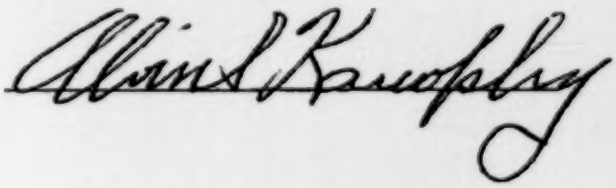
7. **The Courts continue to ignore the fraud and corruption prevalent in the area of Bethlehem and Pennsylvania.**

The numerous cases for fraud and corruption are increasing and developing as the appellant writes this petition. Where will it stop? And when will the government admit that there is a basis for the claims of Kanofsky. For example, the head of the state democratic party, T.J. Rooney, is right here in Bethlehem. His one uncle, Fred Rooney, worked with Bethlehem Steel to force out the Jewish merchants on Third street, in order to get the properties for Bethlehem Steel's expansion.

His father was a Bethlehem steel executive. The Chief Justice, John Roberts, is well aware of all of this history. Where will it stop? Is there no limit to the corruption of government? A ruling in the Appellant's favor will be a substantial step in reducing this corruption, and thus this case has enormous public policy effects.

CONCLUSIONS:

This case is of tremendous legal and public policy importance, for all of the reasons given above. The Petitioner respectfully requests that the U.S. Supreme Court grant his Petition for Writ of Certiorari.



Dr. Alvin S. Kanofsky

September 2, 2008

APPENDIX A

OPINION OF THE COURT

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 07 -1860

ALVIN S. KANOFSKY,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

On Appeal from the United States Tax Court

Tax Court No. 04-12547

Submitted Pursuant to Third Circuit LAR 34.1(a)

March 19, 2008

Before: SCIRICA, Chief Judge, HARDIMAN, and

STAPLETON, Circuit Judges

(Filed: April 1, 2008)

OPINION OF THE COURT

OPINION OF THE COURT

PER CURIAM

Dr. Alvin S. Kanofsky appeals, pro se, the decision of the United States Tax Court sustaining the determination of the Commissioner of Internal Revenue ("Commissioner") of deficiencies related to his federal tax retuirns for the years 1996 through 1998. For the reasons that follow, we will affirm the judgment of the Tax Court.

The parties' familiarity with the facts and procedural history is assumed. To summarize, Kanofsky, a full-time professor of Physics at Lehigh University filed individual tax returns in 1996 through 2000 where he reported , on Schedule C, Profit or Loss From Business, zero gross receipts, zero gross income, and substantial deductions from alleged business activities. In April 2004, the Commissioner sent Kanofsky a notice of deficiency ("notice) regarding additional federal; income taxes due for the 1996 through 2000 tax years and accuracy related penalties for 1997. This notice denied all of Kanofsky's 1996-98 Schedule C deductions and also denied a portion of his 1999 and 2000 deduictions.[1] These 1996 through 1998 dedials were based on the Commissioner's determination that Kanofsky was not engaged in a trade or business during those years and thus was not eligible to deduct

1 For each of these years, the Commisioner permitted some disallowed Schedule C deductions to be converted into Schedule A deductions applying to investment properties. Additionally, for 1999 and 2000, some schedukle C expenses were disalloed for lack of substantiation, but deductions were allowed for business expenses associated with Kanofsky's real estate properties.

his expenses. See I.R.C. Sec 162. For 1997, the IRS also determined that Kanofsky was subject to an accuracy-related penalty. See I.R.C. Sec 6662.

In July 2004, Kanofsky appealed these determinations to the Tax Court. The matter proceeded to trial, and the Tax Court issued a decision in favor of the Commissioner with some computational adjustments. First, the Tax Court sustained the Commisioner's denial of the 1006 through 1998 business expense deductions, determining that the evidence was insufficient to establish that Kanofsky was engaged in a trade or business during that period. Second, the Tax Court issued modifications to the deficiency determinations for 1997 through 1999 in order to address and correct minor computational errors. Third, the Tax Court sustained the 1997 accuracy-related penalty but reduced its amount. Thus, the Tax Court determined deficiencies in income tax paid – due to an increase in Kanofsky's taxable income – for 1996, 1997, 1998, 1999, and 2000 in the amounts of $14,506, $10,109, $10,055, $716, and $2,970, respectively; and an accuracy-related penalty, under I.R.C. Sec. 6662, due for 1997 in the amount of $431. Kanofsky filed a motion to vacate or revise the decision, which the Tax Court denied.Kanofsky's notice of appeal was timely filed [2]. In this appeal he claims

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2 The Tax Court's decision was entered on November 17, 2006, and Kanofsky's motion to vacate was files on December 19, 2006. The record makes plain, however, that the motion to vacate was timely filed, extending the time in which Kanofsky could file a timely appeal. See Rule 162, Tax Court Rules of Practice and Procedure; See also Fed. R. App. P. 13(a)(2). The Tax Court entered its decision resolving the motion to vacate on December 20, 2006, sp Kanofsky had until March 20, 2007 to appeal. Kanofsky's notice of appeal was timely filed on March 16, 2007.

that the Tax Court: (1) improperly denied business expense deductions for 1996-1998 [3] and (2) abused its discretion in excluding certain evidence offered by Kanofsky at trial.

We have jurisdiction to review decisions of the Tax Court under 26 U.S.C. Sec 7482 (a) (1). We review the Tax Court's factual findings for clear error and exercise plenary review over its conclusions of law. Se PNC Bancorp v. Comm'r, 212 F. 3d 822,827 (3rd Cir. 2000). Tax deductions are a matter of legislative grace. See Interstate Transit lines v. Comm'r 319 U.S. 590, 593 (1943). Thus, the burden is on the taxpayer to show that the expenses are deductible. See INDOPCO Inc. v. Comm'r 503 U.S. 79, 84 (1992); See also Nat'l Starch and Chem Corp. v. Comm'r., 918 F 2d 426, 429 (3rd Cir. 1990). We review the Tax Court's rulings regarding the admission of evidence and stipulation of fact for abuse of discretion. (See Old Chief v. United States, 519 U.S. 172, 174 n.1 (1997) (the standard of review applicable to the evidentiary rulings of the trial court is abuse of discretion).

The Tax Court did not clearly err in finding that Kanofsky was not engaged in a trade or business in 1996-98. Section 162 (a) of the Intrernal Revenue Code permits a deduction for all ordinary and necessary expenses paid or

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3 Kanofsky's appeal of the tax court's deficiency determination is somewhat circumscribed as his brief seeks only the reductions of deficiencies in 1996 through 1998 to amounts comparable to those allowed by the Commisioner in 1999 and 2000 where some, but not all of his deductions were permitted. For its part, the Tax Court noted that Kanofsky's evidence of business use for his three properties is no more convincing for 1999 and 2000 than it is for 1996-1998; however, the Commisioner did not disavow its previous decision not to challenge the 1999 and 2000 deductions at trial.

incurred during the taxable year in carrying on any trade or business." In order to deduct these expenses, however, five requirements must be met: "the item claimed as deductible (10 was paid or incurred during the taxable year;(2) was for carrying on a trade or business;(3) was an expense; (4) was a necessary expense; and (5) was an ordinary expense." See Neonatology Assocs., PA. v Comm'r 2999 F 3d 221, 228 (3rd Cir. 2002) (citing Comm'r v Lincoln Sav. & Loan Ass'n, 403 U.S. 345,352 (1971)). The concept of trade or business is a "concept which falls far short of reaching every income or profit making activity. Whipple v. Comm'r, 373 U.S. 193, 202 (1963) As the Supreme Court stated in Commissioner v. Groetzinger

> Not every income-producing and profit-making endeavor constitutes a trade or business. We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby or an amusement diversion does not qualify.

480 U.S. 23, 35(1987). Further, "courts have consistently held that section 162(a) does not permit current deductions for start-up or pre-opening expenses incurred by taxpayers prior to beginning business operations." Johnson v. Comm'r 794 F.2d 1157, 1160 (6th Cir. 1986); see also Richmond Television Corp v. United States, 341 F 2d 901, 907 (4th Cir 1965) (reasoning that a taxpayer is not "engaged in carrying on a trade or business within the intendment of section 162(a) until such time as the business has begun to

function as a going concern and performed those activities for which it was organized")

In his brief, Kanofsky argues that he was "active in business in high technology consulting, real estate development, and corporate start-ups and also in owning a music club, a flea market, and for whistle blowing" Further, according to Kanofsky, during the years 1996-2000... he was further developing ideas for companies, creating companies, and expanding on earlier research projects and ideas, developing patents , and protecting the company interests with law suits, etc. as well as using his building for business purposes and improving the building, such as with extensive renovations and improvements to the exterior" The problem, however, is that he neither produced documentary evidence nor witnesses to corroborate any of these contentions. But even taking Kanofsky's testimony and arguments at face value does him no service as there was no contention that he held himself out as providing goods or services of any kind to anyone. In fact, most of Kanofsky's testimony and appellate filings describe not how he went about conducting his own business, but how others went about conducting theirs. He describes in detail, much of it incendiary and not worth reprinting, how he has been thwarted from conducting his business by numerous third parties in Lehigh Valley, Pennsylvania. These arguments do not advance his cause. Moreover, as the Tax Court also surmised, Kanofsky's 1996 through 1998 Schedule C reporting showing zero gross receipts,but expenses which were greater than his only source of income, wages as a professor, for each year in question –

wholly supports a finding that he was not engaged in any trade or business during this period. Finally, Kanofsky argues that the Commissioner was inconsistent in that he ruled that Kanofsky was in business in 1999 and 2000, but not in business in 1996, 1997, and 1998, when he was engaged in essentially identical activity. We note on this point, Kanofsky may simply be equating inconsistency with benevolence. It is plain from the transcript of the Tax Court's hearing that Kanofsky's 1999 and 2000 returns would in all likelihood have suffered a similar fate as his 1996 through 1998 returns if the Commissioner had sought to challenge them.

Therefore, the Tax Court did not err in upholding the Commissioner's disallowance of the business expense deductions.

The Tax Court also did not abuse its discretion in excluding certain evidence presented by Kanofsky at trial. In its written opinion, the Tax Court noted that "during trial, (Kanofsky tried to place in evidence a number of documents in support of his argument that he incurred deductible business expenses during the years at issue. Most of these documents were not admitted into evidence, either because they constituted inadmissible hearsay, or because their admission into evidence would have violated the (court's)... so-called 14-day rule." We find, after reviewing the transcript, that the Tax Court acted within its discretion in excluding the untimely filed documents because they were not produced in accordance with the court's own procedural rule. See Sunik v Comm'r 321 F. 3d 335, 337 (2d Cir. 2003) Further, Rule 143(a) of the Tax

Court Rules provides in relevant, part, that trials before the Tax Court shall be conducted in accordance with the Federal Rules of Evidence. See also I.R.C. Sec.7453. The court also did not err in denying Kanofsky's additional submissions which constituted inadmissible hearsay (handwritten notes and calculations). Moreover, Kanofsky has not demonstrated what any of these documents would have added to his own testimony that same day. The transcript indicates that much of the evidence at issue was at best cumulative, and at worst irrelevant as it related to tax years not involved in the action before the court.

For the foregoing reasons, we will affirm the Tax Court's judgment.

April 1, 2008

APPENDIX B

Denial of Petition for Review

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 07 -1860

ALVIN S. KANOFSKY,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

(Tax Court No. 04-12547)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge

SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN andSTAPELTON*,Circuit Judges.

The petition for rehearing filed by appellant to the above-entitled case having been submitted to the judges

who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing , the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/S/ Anthony J. Scirica
Chief Judge

Dated: June 4, 2008

CH/cc: Mr. Alvin S. Kanofsky
Richard Farber, Esq
John Schumann, Esq.

(13)

Supreme Court, U.S.
FILED

08 609 SEP 2 - 2008

No. _____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Dr. ALVIN KANOFSKY , PhD. - PETITIONER-APPELLANT

Vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE

RESPONDENT-APPELLEE

MR.MICHAEL MUKASEY – ATTORNEY GENERAL

Mr. RICHARD FARBER, ESQ.
Mr. JOHN SCHUMANN, ESQ.

Attorneys Tax Division, Department of Justice
Post Office Box 502
Washington, D.C.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS FOR CASE 07-1860 IN PHILADELPHIA

DR. ALVIN S. KANOFSKY , Pro-Se
229 E. CHURCH STREET
BETHLEHEM, PA. 18018
610 –867-8064

SUPPLEMENT

Appendix C – Tax Court Decision

T.C. Memo, 2006 -79

UNITED STATES TAX COURT

ALVIN S. KANOFSKY, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 12547 – 04 Filed April 18, 2006

P, a full-time professor of physics at Lehigh University, filed 1996-2000 individual income tax returns in which he reported, on Schedule C, Profit of Loss From Business, zero gross receipts and substantital deductions from alleged business activities. R denied the 1996-98 Schedule C deductions on the ground that P was not engaged in any trade or business, and he denied a portion of the 1999 and 2000 Schedule C deductions on the ground that the disallowed expenses were unrelated to P's business activities. For all of the audit years, however, R allowed some of P's expense as deductions on Schedule A, Itemized Deductions. For 1997, R also determined that P is subject to the sec 6662, I.R.C., accuracy-related penalty.

1. Held: R's denial of business expense deductions under sec. 162(a), I.R.C., sustained.
2. Held, further, modifications to the deficiency determination for 1997-99 required in order to

correct computational errors.

3. Held, further, R's penalty against P for 1997 sustained, in part, under sec. 6662, I.R.C.

Alvin S. Kanofsky, pro se.

Frank J. Jackson, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

HALPERN, Judge: By notice of deficiency dated April 19, 2004 (the notice), respondent determined deficiencies in petitioner's Federal income tax and an accuracy-related penalty as follows:

Tax Year Ending Dec.31	Deficiency	Penalty Sec 6662(a)
1996	$14,506	
1997	15,437	3,087.40
1998	10,078	
1999	716	
2000	2,970	

By the petition, petitioner assigns error to respondent's deficiency determination for all years and his penalty determination for 1997. After concessions, [1] the issues for decision are whether petitioner is (1) entitled to deductions he claimed on the schedules C, Profit or Loss from Business, for each of the years at issue greater than those deductions allowed by respondent on either Schedule C or Schedule A, Itemized Deductions, and (2) liable for the section 6662(a) accuracy-related penalty for 1997.

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT

Some facts are stipulated and are so found. The stipulation of facts with accompanying exhibits, is incorporated herein by this reference.

At the time the petition was filed, petitioner resided in Bethlehem, Pennsylvania.

Background

During the years at issue, petitioner was employed as a full-time professor of physics at Lehigh University.

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1 Petitioner concede respondent's inclusion in income of (1) $70 of unreported interest for both 1999 and 2000, and (2) an unreported State tax refund of $30 for 1999.

Petitioner earned a B.A. and an M.S. in physics and a PhD in experimental particle and nuclear physics from the University of Pennsylvania. During the years at issue, petitioner owned property at 30 East 3d Street in Bethlehem Pennsylvania (the Bethlehem property), an apartment in Mt. Pocono, Pennsylvania, and an apartment in North Shirley, Long Island. Petitioner did not lease any of the properties to tenants during 1996-98.

Petitioner's Returns

For each year in issue, petitioner filed a Form 1040, U.S. Individual Income Tax Return, showing zero taxable income and no tax due. On a Schedule C attached to each of those returns, petitioner listed as his principal business or profession "Research and development" and as the name of his business " A.S. K. Enterprises". Only the 1999 and 2000 Scehdules C listed a business address, which was 30 E. 3rd St., Bethlehem,PA 18015 (The Bethlehem property). All of the Schedules C report zero gross receipts and zero gross income, and they report the following amounts of total expenses (and resulting losses):

Year	Schedule C Expenses
1996	$72,786
1997	75,388
1998	80,675
1999	85,845
2000	80,020

The Notice

The notice disallows all of petitioner's 1996-98 reported schedule C expenses and a portion ($33,945 for 1999 and $40, 113 for 2000) of those expenses for 1999 and 2000. Those disallowances are based upon respondent's determination that petitioner failed to establish that he " he incurred or, if incurred, paid these amounts during the taxable years for ordinary and necessary business purposes".

The disallowance of petitioner's claimed Schedule C deductions for 1996-98 is based upon respondent's view that petitioner was not engaged in a trade or business during those years. For each of those years, however, respondent allows some of the disallowed Schedule C deductions (e.g. insurance, taxes, mortgage interest) as Schedule A deductions with respect to investment properties. For 1996 and 1997 respondent also allows Schedule A deductions for employee business expenses.

By his treatment of petitioner's Schedule C expenses for 1999 and 2000, respondent, in effect, concedes that, during those years, petitioner was carrying on a trade or business at the Bethlehem property, but not at his other two properties, which respondent continues to treat as investment properties. For 1999 and 2000, respondent allows Schedule C deductions for expenses associated with the Bethlehem property, but converts the portion of petitioner's Schedule C deductions for taxes and interest associated with the other two properties into Schedule A deductions.

The total additional Schedule A deductions allowed each year are as follows:

Year	Additional Schedule A Deductions
1996	$46,632
1997	20,933
1998	42,881
1999	23,235
2000	22,414

OPINION

I. Burden of Proof

Generally, a taxpayer in this Court bears the burden of proof. Rule 142 (a) (1). In certain circumstances, however, if the taxpayer introduces credible evidence with respect to any factual issue relevant to ascertain the proper tax liability, section 7491 shifts the burden of proof to the Commissioner. Sec. 7491 (a)(1); Rule 142(a) (2). Credible evidence is evidence the Court would find sufficient upon which to base a decision in the issue in favor of the taxpayer if no contrary evidence were submitted. See Higbee v. Commissioner, 116 T.C. 438, 442 (2001); Bernando v. Commissioner, T.C. Memo, 2004 – 199 n. 6. Section 7491 (2) imposes certain prerequisites to the application of section 7491 (a) (1), including that the taxpayer has complied with the requirements under the Internal Revenue Code " to substantiate any item". Sec 7491 (a) (2) (A).

As discussed infra, petitioner has failed to introduce credible evidence of his entitlement, under section 162, to the disallowed Schedule C deductions. Therefore, petitioner bears the burden of proof with respect to his entitlement to those deductions pursuant to rule 142 (a), a burden that, because of the absence of credible evidence of deductibility, petitioner cannot sustain. See Bernardo v. Commissioner, supra n.7

Under section 7491(c), respondent retains the burden of production (but not the overall burden of proof with respect to petitioner's liability for the accuracy-related penalty under section 6662(a). See Higbee v. Commissioner, supra at 446-447.

II. Petitioner's Schedule C Deductions

A. The Parties' Arguments

On brief, respondent summarizes his position as follows:

> Specifically, petitioner failed to offer any evidence other than his uncorroborated testimony, that he was engaged in a trade or business in taxable years 1996, 1997, and 1998, and (he) failed to produce adequate records which substantiate the disallowed Schedule C expenses in taxable years 1996-2000 * * *

Petitioner testified at trial and reiterates on brief that he has been engaged in various business activities for the past 25 years and that, as petitioner puts it on brief, during the 1996-2000 period, he was actively developing

ideas for companies, creating companies, and expanding on earlier research projects and ideas, developing patents, and protecting the company interests with law suits (sic), etc. as well as using his building for business purposes and improving the building."

B. Deductibility of Expenses Under Section 162 (a)

Section 162 (a) permits a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business". Any amount claimed as a business expense must be substantiated, and the taxpayer is required to maintain records sufficient to establish that he or she is entitled to the claimed deduction Sec.6001 Hradesky v. Commissioner, 65 T.C. 87 (1975), affd. Per curiam 540 F. 2d 821 (5th Cir. 1976); sec. 1.6001-1(a), Income Tax Regs. In some circumstances, if a taxpayer established that he or she incurred a deductible expense but cannot substantiate it in full, the Court, may approximate the amount of an allowable deduction. See Cohan v. Commissioner 39 F.2d 540, 543-544 (2d Cir 1930) (the Cohan rule. The approximation, however, must have some evidentiary basis. Vanicek v. Commissioner , 85 T.C. 731 742-743 (1985). With respect to certain business and other expenses specified in section 274 (d) more stringent substantiation requirements apply. Those requirements supersede the application of the Cohan rule. See sec. 1.274 – 5T (a). Temporary Income Tax Regs., 50 Fed. Reg. 46014 (Nov. 6, 1985)

C. Discussion

1. 1996-98

During the trial, petitioner tried to place in evidence a number of documents in support of his argument that he incurred deductible business expenses during the years at issue. Most of those documents were not admitted into evidence, either because they constituted inadmissible hearsay, or because their admission into evidence would have violated the Court's standing pretrial order dated October 8 , 2004, in particular the so-called 14 day rule contained in that order, which states that, in the absence of good cause shown, the court may exclude from evidence any documents not "exchanged by the parties at least 14 days before the first day of the trial session."

The documents petitioner offered during the trail that were accepted into evidence indicate that petitioner did, in fact, ,make certain expenditures during the years at issue. [2] But there is no indication that those documents (copies of canceled checks, bank statements, receipts, correspondence, petitioner's handwritten notes, and other documentation) reflect expenditures that relate to any trade or business petitioner conducted during the 1996-98 taxable years.

Nor does petitioner's trial testimony support his

2 Respondant allowed some of those substantiated expenditures as Schedule A deductions.

position. Other than stating that he has "engaged in business activity for the past 25 years" and has been "consulting and developing companies over many years", and that he started back in 1980 with a company, ASK Enterprises and *** tried to develop the company over the years", his testimony generally describes the manner in which he was thwarted by third parties from pursuing any business activities.

Neither petitioner's exhibits nor his exhibits nor his testimony is sufficient to establish that he was engaged in a trade or business during the 1996-98 period. Moreover, petitioner's 1996-98 Schedules C reporting zero gross receipts from ASK Enterprises support a finding that he was not engaged in any trade or business during that period.

Assuming arguendo that petitioner made efforts to engage in a trade or business during the 1996-98 period and he held (and incurred expenses with respect to) his investment properties (and, in particular the Bethlehem property) in connection with those efforts , such activities do not amount to carrying on any trade or business" within the meaning of section 162 (a). See Richmond Television Corp. v. United States 345 F.2d 901, 907 (4th Cir. 1965), vacated and remanded on other issues 382 U.S. 68 (1965)

The uniform teaching of these several cases is that, even though a taxpayer has made a firm decision to enter into business and over a considerable period of time spent money in preparation for entering that business, he still

has not engaged in carrying on any trade or business" within the intendment of section 162(a) until such time as the business has begun to function as a going concern and performed those activities for which it was organized. (Fn. Ref. omitted)

Accord Hardy v. Commissioner, 93 T.C. 684, 687 (1989); Goodwin v. Commissioner 75 T.C. 424, 433 (1980), affd without published opinion 691 F. 2d 490 (3d Cir. 1982); Madison Gas & Elec. Co. v Commissioner, 72 T.C. 521, 566-567 (1979), affd. 633 F. 2d 512 (7th Cir. 1980)

On brief, petitioner attempts to flesh out his trial testimony by describing in great detail his efforts, beginning in 1980, at establishing various businesses. In support of these representations petitioner attached appendices to his briefs which contained many of the exhibits excluded at trial as well as additional material not presented at trial. Neither statements in briefs nor attachements to brief constitute admissible evidence, and neither may be considered by the Court. See Rule 143(b); Bialo v. Comissioner, 88 T.C. 1132, 1140 (1987); Kwong v. Commissioner, 65 T.C. 959, 967 n. 11 (1976); Perkins v. Commissioner, 40 T.C. 330, 340 (1963). [3]

2. 1999 and 2000

Petitioner's evidence of business use for his three properties is no more convincing for 1999 and 2000 than it

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3 Consistent with that principle, the appendices were detached from petitioner's brief and reply brief and returned to petitioner pursuant to an order of this Court dated July 7, 2005.

is for 1996-98. Nevertheless, as we said supra, respondent in effect concedes that petitioner used the Bethlehem property (but not his other two properties) in carrying on a trade or business during 1999 and 2000.

On petitioner's Schedules C for both 1999 and 2000, he claims 11 expense items. For 1999, respondent challenges portions of six of the items, and for 2000, he challenges portions of five. Two of those disallowed expenses (interest and taxes, presumably associated with his other two properties) are allowed as Schedule A deductions. Petitioner has failed to produce evidence that the amounts allowed as either Schedule A or Schedule C deductions were insufficient or that respondent's division of these deductions between Schedules A and C was improper.[4]

D. Conclusion

Petitioner has failed to introduce credible evidence (therefore, failed to carry his burden of proving) that he is entitled to deductions for the years at issue greater than those allowed by respondent.

III. Respondent's Computational Errors

A. 1997

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4 For 1999 and 2000, it is immaterial whether deductions are allowed on Schedules A or C because petitioner's Schedule A deductions for those years are not subject to reduction pursuant to either sec. 67 (2 – percent floor on miscellaneous itemized deductions) or sec. 68 (overall limitation on itemized deductions), nor do they generate alternative minimum tax.

The parties have stipulated that one of the disallowed Schedule C deductions that is allowed as a Schedule A deduction is $19,119 of mortgage interest. Respondent's allowance of that amount as a Schedule A deduction is also reflected in the examining agent's Form 886-A Explanation of Items, for 1997 (The 1997 Explanation of Items). The computation of the 1997 Schedule A deductions contained in the notice, under the heading "per exam" allows no interest expense deduction. As a result, the total allowable itemized deductions for 1997 (before reduction for the overall limitation on itemized deductions under section 68) is $24,798 rather than $43,915, which would be the amount if the $19,119 deduction for mortgage interest were included as a 1997 Schedule A deduction. In light of the 1997 Explanation of Items, we view respondent's stipulation that he "allowed on Schedule A*** interest in the amount of $19,119" as an admission that the notice inadvertently and improperly failed to include that amount in its computation of petitioner's Schedule A deduction for 1997. That error necessarily results in an overstatement of the petitioner's deficiency determination for 1997. [5]

B. 1998 and 1999

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5 Although the agent's 1996-1998 Forms 886-A, Explanation of Items (the only three in evidence), permit Schedule A mortgage interest expense decutions with respect to petitioner's three investment properties, the notice's computation of Schedule A deductions for 1998-2000 lists the additional interest expense as " Home Interest Expense.". That mischaracterization, however, has no impact on the deductible amounts.

Respondent made two minor computational errors for 1998 and 1999.

Petitioner's 1998 Schedule C lists total deductions of $80, 675. Both the notice and the agent's form 886-A for 1998 disallow the deduction of $80,765 of sSchedule C expenses. On account of that inadvertent transposition of numbers , the deduction disallowance is $90 greater than the actual deduction.

In the notice, the computation of each year's adjustment for increased Schedule A deductions properly reduces Schedule A deductions "per Exam" by petitioner's Schedule A deductions "per return". For 1999, however, the notice computation mistakenly fails to offset the Schedule A deductions "per exam', which include a $250 charitable contribution that had been reported on petitioner's 1999 Schedule A as filed, by the amount of that deduction.[6] Thus, the 1999 adjustment for increased Schedule A deduictions should be $22, 985, not 23, 235 as stated in the notice.

C: Conclusion

The correction of the foregoing computation errors will be reflected in the rule 155 computation in this case.

IV Accuracy-Related Penalty for 1997

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6 The amount shown as "per return" total itemized deductions does not include the amount shown for "contributions", $250.

A. Applicable Law

Section 6662 provides for an accuracy-related penalty (the penalty) in the amount of 20 percent of the portion of any underpayment attributable to, among other things, negligence ar intentional disregard of rules or regulations (without distinction, negligence), any substantial understatement of income tax, or any substantial valuation misstatement , See Sec 6662(b) (1)-(3). Respondent determined the penalty against petitioner for 1997. Although the notice states that the respondent bases his imposition of the penalty upon one or more of the three above reference grounds (and although the 1997 underpayment respondent determined appears, on its face, to be a "substantial understatement" within the meaing of section 662 (d) (1)), the only issue respondent raised on brief is whether petitioner's 1997 underpayment is attributable to " negligence or disregard of rules or regulations." [7]

Section 6662 (c) defines the term "negligence", for purposes of section 6662 as including "any failure to make a reasonable attempt to comply with the provisions of this title", and the term " disregard" as including " any careless, reckless, or intentional disregard." Negligence has been generally defined as lack of due care or failure to do what a reasonably prudent person would do under

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7 Therefore, we consider respondent to have abandoned the substantial understatement argument. See Bernstein v. Commissioner, 22 T.C. 1146, 1152 (1954), affd. 230 F.2d 603 (2d Cir. 1956); Lime Cola Co. v. Commissioner, 22 T.C. 593, 606 (1954); Roberts v. Commissioner, T.C. Memo, 1996-225.

like circumstances. See, e.g., Hofstetteer v. Commissioner, 98 T.C. 695, 704 (1992). It also includes any failure by the taxpayer to keep adequate books and records or to substantiate items properly." Sec 1.6662-3(b) (1). Income Tax Regs.

Section 6664 (c) (1) provides that the accuracy-related penalty shall not be imposed with respect to any portion of an underpayment if it is shown that there was reasonable cause for that portion and the taxpayer acted in good faith with respect to that portion.

The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case by case basis, taking into account all pertinent facts and circumstances. * * * Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of * * * law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer. * * *

Sec. 1.6664 – 4(b) (1), Income Tax Regs

B. Analysis and Conclusion

On brief, respondent alleges that petitioner's failure to maintain and produce adequate records of his alleged business activities shows both negligence and intentional disregard of the section 6001 requirement to kept permanent records to establish his gross income and deductions. Respondent also argues that " petitioner has not

offered nay evidence * * * that he acted reasonable and in good faith in filing his 1997 income tax return." Petitioner disagrees.

From his testimony, we infer that, both before and during the years at issue, petitioner was seeking to use one or more of his three investment properties in the conduct of a trade or business. Respondent does not challenge[8] that testimony, and we have no reason to disbelieve it.Petitioner's error was to treat the expenses associated with his attempts to establish a business operation at one or more of his properties (essentially pre-startup expenses since they have not been shown to relate to the future commencement of any specific trade or business) as section 162 (a) ordinary and necessary business expenses, deductible on Schedule C.

We have sustained the tax deficiency for 1997 on the basis of case law (including decisions of this Court) holding that section 162 (a) applies only to the expenses of an operating business. It is clear, however, that the courts have not acted uniformly in dealing with the issue of whether and in what circumstances pre-operating expenses may be treated as currently deductible business expenses. In some case,(contrary to the above-cited decisions of this Court) courts have permitted section 162 (a) business expense deduction for preoperating expenses. See, eg. 379 Madison Ave., Inc. v. Commissioner, 60 F 2d 68 (2d Cir.

8 Petitioner's testimony is consistent with the examining agent's determination to treat certain of petitioner's Schedule C expenses for 1997 as either deductible (on Schedule A) or capitalizable expenses associated with "rental property".

1932 (a net loss attributable to rent, real estate taxes, and interest paid during the construction of a building first ready for occupancy by tenants in a subsequent taxable year held deductible as part of a net loss from a "business regularly carried on"), revg. And remanding 23 B.T.A. 29 (1931); Blitzer v. United States, 47 AFTR 2d 81-1005, at 81-1018, 81-1 USTC par. 9262, at 86,633 (Ct. Cl. 1981) (in dicta, the court states that preoperating expenses that are recurring in nature and do not provide benefits extending beyond the taxable year may be deductible under section 162); United States v. Manor Care, Inc., 490 F Supp. 355, 362 (D.Md. 1980) (preoperating expenses incurred by a nursing home taxpayer in the same taxable year in which the required nursing home licenses were later issued and operations were later commenced held to be deductible business expenses under section 162(a) in the year incurred); [9]see also Carter-Colton Cigar Co. v. Commissioner, 9 T.C. 219, 221 (1947) (vacant lot intended as the site for a warehouse and store building to be used in the taxpayer's tobacco business, the construction of which was abandoned due to adverse economic circumstances, held to constitute ad asset " used in the trade or business of (the taxpayer)" thereby giving rise to ordinary rather than capital losses on the sale of the lot).

The foregoing cases all involve expenses (or the acquisition and sale of property) preparatory and related to a specific business (or business use) that is either

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9 See Goodwin v. Commissioner, 75 T.C. 424, 433 n. 8 (1980), affd. Without publishing opinion 691 F2d 490 (3rd Cir. 1982), wherein we question the District Court's analysis.

certain or anticipated to commence in the near future. In contrast, the evidence in this case indicates that petitioner's 1997 expenses were incurred before any firm expectation of a specific business use for the petitioner's investment properties. That is a factual distinction that one might reasonably expect an experienced tax professional to make,but not a physics professor, even one with a PhD.[10] Therefore, we find the case law permitting a business expense deduction for preoperating expenses to be indicative of the fact that petitioner's position was not unreasonable and, therefore, not negligent, and that, in any event, petitioner acted in good faith and with reasonable cause in treating the expenses listed in his 1997 Schedule C as ordinary and necessary business expenses under section 162 (a). See sec. 1.6664-4(b) (1), Income Tax Regs.; see also Keller v. Commissioner, T.C. Memo. 1996-300 (college professor who improperly claimed a travel expense deduction for a sabbatical trip during which he engaged in study unrelated to the stated sabbatical purpose acted in good faith and was not liable for the accuracy-related penalty where there were no regulations or other forms of clear-cut guidance specifying the reach of section 274 (m) (2), which denies a deduction for the expense of travel as a form of education).

Nor do we agree with the respondent that negligence and intentional disregard are shown by petitioner's alleged failure to maintain and produce books and records to

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10 There is no evidence the petitioner has any training or background (other than in the preparation of his own returns) in the area of Federal income taxation.

support his claimed Schedule C deductions as required by section 6001. It is not always necessary that a taxpayer maintain a formal set of readily auditable books in order to satisfy the books and records requirement of section 6001 and section 1.6001-1(a), Income Tax Regs., See Westby v. Commissioner, T.C. Memo. 2004-179. At trial, petitioner presented documentary evidence, by category, of a portion of his claimed 1997 expenses. Moreover, the examining agent's 1997 Explanation of Items treats as either deductible on Schedule A, capitalizable, or nondeductible "Personal or estate expense" all but $8,292 of petitioner's total 1997 Schedule C expenses, which indicates that petitioner substantiated all but $8,292 of those expenses during the audit.

Petitioner claimed 1997 Schedule C expenses of $75, 388 and at trial, offered documentary evidence that, at best, substantiates the expenditure of approximately one-half of that amount. That lack of substantiation in the record supports the examining agent's determination that petitioner's Schedule C deductions included $8,292 of unsubstantiated expenses, and we so find. Therefore, in accordance with section 1.6662-3(b) (1), Income Tax Regs. (negligence includes any failure by the taxpayer **** to substantiate items properly"), we sustain the negligence penalty with respect to petitioner's 1997 underpayment attributable to $8,292 of unsubstantiated expenses.

Decision will be entered Under Rule 155

UNITED STATES TAX COURT

WASHINGTON, DC 20217

ALVIN S. KANOFSKY Petitioner v. COMMISSIONER OF INTERNAL REVENUE Respondent	Docket No. 12547-04

DECISION

On October 17, 2006, the Court filed respondent's computation for entry of decision. On November 8, 2006, the Court filed petitioner's objection to respondent's computation for entry of decision.

Pursuant to the determination of this Court as set forth in its Memorandum Findings of Fact and Opinion (T.C. Memo 2006 – 79) filed April 18, 2006, and incorporating herein the facts recited in respondents computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies and a penalty due from petitioner as follows:

Year	Deficiency	Addition to Tax/Penalty I.R.C. Sec. 6662 (a)
1996	$14, 506	
1997	$10, 109	$431
1998	$10, 055	
1999	$716	
2000	$2,970	

(Signed) James S. Halpern

James S. Halpern
Judge

Entered: Nov 17 2006

s

No. 08-609

Supreme Court, U.S.
FILED
JAN 2 - 2009
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Dr. ALVIN S. KANOFSKY , PhD. - PETITIONER -APPELLANT

Vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE

RESPONDENT-APPELLEE

MICHAEL MUKASEY – ATTORNEY GENERAL OF UNITED STATES
RICHARD FARBER
JOHN SCHUMANN
Attorneys Tax Division, Department of Justice, Post Office Box 502 Washington, D.C.

GREGORY G. GARRE – SOLICITOR GENERAL OF UNITED STATES
Room 5614, Department of Justice, 950 Pennsylvania Ave, N.W. Washington,D.C. 20530 - 0001

PETITION FOR A REHEARING ON EARLIER PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS FOR CASE 07- 1860 IN PHILADELPHIA

DR. ALVIN S. KANOFSKY , Pro-Se
229 E. CHURCH STREET
BETHLEHEM, PA. 18018
610 –867-8064

The Petitioner presents this short Petition for a Rehearing on his previously submitted Petition for a Writ of Certiorari (08-609), which was denied on December 8, 2008, as shown in the attached Exhibit A.

The main question raised by the Third Circuit Court of Appeals in response to his briefs on the Tax Court Case was as to the Truth and Veracity of the Claims made by the Petitioner as to the Fraud and Corruption that was responsible for obstructing his business activities. In the intervening time, since the original petition was submitted on September 11 to the present, there have been provided numerous confirmations as to the rampant fraud and corruption in the private sector and the supporting complicity and lack of oversight in the government sector.

Further investigations are already underway and are revealing and will eventually reveal even further direct actions by individuals and organizations involving fraud and corruption and the lack of government oversight and/or complicity in committing these acts of fraud and corruption.

The intervening period between when the Petition was originally submitted, September 11, and the present time, has been the most momentous in the history of this country in changes regarding how government rules, in changes of the administration of the government, and in the extent of fraud and corruption that has been revealed.

Rule 44 of the Supreme Court allows that any petition for a rehearing of an order denying a petition for a Writ of Certiorari or extraordinary writ shall be filed within 25 days of the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this rule, including the payment of the

filing fee if required, **but its grounds shall be limited to intervening circumstances of a substantial or controlling effect, or other substantial grounds not previously presented.**

Thus, the Petitioner, recognizing the momentous events that have occurred in the intervening time, and their enormous substantial relevance to the earlier and persistent claims made by the Petitioner over many years, some of which have been provided in his original petition of September 11, hereby respectfully submits this Petition to the court for their consideration to once more provide relief and hear his case.

The Petitioner lists below the Widespread Fraud and Corruption aided by Government Complicity and/or Lack of Oversight.

1. The Failings of the Financial Institutions. Again lack of government oversight in the investment vehicles, etc. There was virtually no government supervision, regulation, and disciplinary action of the actions of the financial institutions in participating in corrupt and fraudulent practices, such as credit swaps and bundled securities. This has resulted in a $700 Billion bailout by the U.S. Treasury, headed by Secretary Henry Paulson.

2. The Mortgage Securities Frauds. Again, there is a lack of government oversight. The approval of the government and the rating agencies for the packaged mortgage securities, which were assessed at ratings and values far in excess of reasonable determinations.

3. The Bernard Madoff Scandal. This is one of the

largest fraud and corruption cases ever, involving an enormous Ponzi scheme for a total loss of $50 Billion. Many non-profits had funds invested in the Madoff Investment Funds, with the hope to avoid any U.S. Tax scrutiny with offshore entities. Again, there was a total lack of government oversight and regulation by the Treasury Department, the SEC, and other government agencies.

4. The Pa. Senator Vincent Fumo trial locally. This involved his misuse of non-profits funds and activities, using the non-profits to personally enhance his personal finances, and support his personal activities. Just recently, his assistant, Attorney Christopher Craig has quit his state position, under pressure from the rest of the Democratic lawmakers, for his role in aiding Senator Fumo.

As well, Senator Fumo was the one who sheparded through the legislature a secret $100M midnight appropriation to fund The Barnes Foundation transfer from Lower Merion to Philadelphia. The control of the Barnes and its multibillion Art Collection was wrested from Lincoln University, a black institution, by the Philadelphia Political establishment and the non-profits, such as the Philadelphia Museum of Art, the Pennsylvania Fine Arts Academy, the Lensfest Foundation, the Annenberg Foundation, and the Pew Foundation.

Originally, Dr. Albert Barnes had left the Barnes art collection to Julian Bond's father's control, as head of Lincoln University, to prevent these entities from seizing control. Mr. Bond just recently relinquished his role as head of the national NAACP.

Members of the group are also active at Lehigh University. The Bermans, who were head of the

Philadelphia Art Museum, have been or are on the Lehigh Board of Trustees, as are the Pitcairns, who head the Pennsylvania Academy of Fine Art. They are major donors to Lehigh University and have representatives on the board of Lehigh University. The Princeton Woodrow Wilson Center case was just recently settled with the donors and involves a similar situation where the recipient non profit institution changes the original intent of the donor.

In the Barnes case, the non-profits obstructed the activities of the Barnes, and refused to provide any support for the institution, in order to obtain control. As well, Governor Rendell forced Lincoln University to cooperate in the transfer of control of the Barnes, under threats of cutting funding to the state controlled university.

5. The Conviction of New Jersey Senate Head, Wayne Bryant. He was taking bribes from the University of Medicine and Dentistry of New Jersey (UMDNJ). The defense was that everyone else in the state was on their payroll as well. The Petitioner was the main whistleblower on earlier UMDN J cases, with numerous court filings claiming fraud and corruption on the part of the University. It was only when a New Jersey Star Ledger reporter, Josh Margolin, discovered a UMDNJ check made out to a Philadelphia Politician, Ron White, that it came to light that UMDNJ was making bribery payments to various politicians, while doubling and tripling Medicaid charges. This resulted in UMDNJ being put under the control of Judge Herbert Stern, under a deferred prosecution agreement, arranged by U.S. Attorney Christopher Christie of New Jersey.

The Petitioner's brother, Dr. Paul Kanofsky, was in charge of monitoring UMDNJ's billing records, when he was brutally removed from his position and harassed

and terminated, with his death from cancer occurring immediately after his final termination hearing.

6. The suing of Donald Trump on the Fraudulant Ruling on his casino, by the Pennsylvania Casino Control Commission. The chairman of the commission was forced out for misuse of funds, and it has subsequently been determined that political influence and fraud and corruption resulted in award of a license to Louis DeNaples, an organized crime figure from the Scranton area. He has been indicted for lying about his connections to organized crime, and he is presently awaiting trial in federal court.

7. The Collapse of the Sands Casino and Sheldon Adelson, one of the main contributors to the Republican Party. His company, of which he owns seventy percent, The Las Vegas Sands Company, is near bankruptcy, with the value of its stock having dropped to only about $5/share.from its previous high of $150. Construction of his casino complex in Bethlehem is now only limited to the casino portion of the project, with work on the hotel, convention center, and shopping mall now delayed indefinitely.

8. Illinois Governor Blagojevich's indictment. U.S. Attorney Patrick Fitzgerald's indictment of the governor. Attorney Fitzpatrick originally made a name for himself by prosecuting Mafia in Pennsylvania and New Jersey, and obtaining convictions of the Gambino Mafia family of New Jersey and Pennsylvania.

9. Appointment of Eric Holder as U.S. Attorney General by Barack Obama. Eric Holder is familiar with the organized crime in the Pennsylvania area around Bethlehem, being a Federal Prosecutor of the Mafia

families in the Scranton, Pa. area.

10. Madoff case is now being investigated for offshore holdings of companies and non-profits to avoid taxes and non-profit benefits. The UPS Case that was sealed with a settlement was the biggest Tax Case ever, involving billions of dollars of avoided taxes due to off shore activities. The Petitioner has earlier requested that the case be unsealed.

One of the main heirs to the UPS fortunes is Ms. Marlene (Linny) Fowler, whose Father and Uncle, the Oberkotters, were head of UPS and perpetrated the fraud. Ms. Fowler is one of the main non-profit activists in the Bethlehem area, and is one of the main opponents and obstructionists of the Petitioner's activities.

11. Milton Street conviction for Income Tax Evasion. The brother of the Philadelphia Former Mayor, John Street, was sentenced for Income Tax Evasion, but cleared of racketeering charges.

12. Secretary of the Treasury Paulson's heading the $700 B bailout. He is national head of the Nature Conservancy, again a group opposed to the activities of the Petitioner. The Petitioner's building is at a prime location on the Regional Greenway that is being promoted by the Nature and Wildlife Conservancy, headed by Susan Cumings.

13. Again, the U.S. Treasury providing funds for the bail-out of the U.S. Auto Industry. The first bail-out was with Chrysler Corporation, headed by Lee Iacocca, a Lehigh University graduate, and active alumnus. This bailout set

a precedent to bail out GM and Chrysler at this present time. The early bail-out probably contributed to the decline and present day crisis situation of the auto companies, since they saw that the could rely on the U.S. Government to come to their aid if needed.

14. The present Israeli Hamas conflict. The local non-profit and for-profit entities are major supporters of the Arab-Palestinian cause. They have a long standing and deep hatred of Jews and Israel, and support and incite the Arabs against the Jews. It is well known that the Petitioner and his family are major supporters of Israel and Jewish causes, and as such bear the brunt of the local community's hatred.

The local community of Moravians are of Germanic stock , and settled Bethlehem in 1743. They have always had an intense connection with Germany. Prior to World War II, the head of Bethlehem Steel, Eugene Grace, was a member of America First. As the top paid executive in the country, he was a frequent target of criticism from Franklin Roosevelt, who also had Henry Morganthau, his Jewish personal friend and Treasury Secretary, pursue Grace for income tax evasion. Grace refused to support Roosevelt's actions against the Nazis, and it was only with the attack on Pearl Harbor that Roosevelt could force Bethlehem Steel into supporting the war effort.

Before and since that time, Bethlehem Steel and the Bethlehem community, have discriminated against Jews. Jews were not allowed membership in the Bethlehem Steel Country Club. Jews were forced off of their properties in the downtown area of Bethlehem. Chief Supreme Court Justice Roberts, the son of a Bethlehem Steel executive, would have personal knowledge of these policies, as well as of the largest discrimination case against Black Americans

being won against Bethlehem Steel.

Most recently, the community has supported and incited the Arabs and
Palestinians in their conflict against Israel. During the last Intifida, just before 9/11, local churches sent a delegation to occupy the Church of the Nativity against Israeli attack in Bethlehem on the West Bank. Local churches supported a boycott of Israel. Local churches supported Intifida hospitals, etc. Local groups led the criticism of so called Israeli atrocities against civilians and the call for giving up land to the Arabs.

Local companies such as Air Products (Industrial Gases) and Fuller Company (Concrete Plants) work with the Arab Countries to develop their oil fields and construction industry. Their determination to block any activities of the Petitioner exists to this day, and are a violation of the equal rights laws.

Petitioner prays that the Court take into account these numerous cases of fraud and corruption in considering the truth and veracity of his claims of fraudulent and corrupt activity in obstructing the Petitioner's activities, and that the court provide Petitioner relief and hear his case.

Respectfully submitted,

Alvin S Kanofsky

Date: JANUARY 20, 2009 Dr. Alvin S. Kanofsky

EXHIBIT A

Court Action

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 8, 2008

Mr. Alvin S. Kanofsky
229 E. Church Street
Bethlehem, PA 18018

Re: Alvin Kanofsky
v. Commissioner of Internal Revenue
No. 08-609

Dear Mr. Kanofsky:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter, Clerk

Certification that Submission of Petition is in Good Faith and Not for Purposes of Delay

I state that the Petitioner is submitting this Petition for a Rehearing according to substantive changes in the situation and in good faith and not for delay, as required by Rule 44 of the Supreme Court.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on:

Date JAN. 20, 2009

Dr. Alvin S. Kanofsky

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **PETITION FOR A REHEARING ON THE PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS** was served on the respondent by mailing the same on Jan. 21, 2009 by Express Carrier, addressed as follows:

Solicitor General: Gregory G. Garre
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530 – 000

Date JAN 20, 2009

Dr. Alvin S. Kanofsky

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **PETITION FOR A REHEARING ON THE PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS** was served on the respondent by mailing the same on Jan. 21, 2009 by U.S. Express Mail, addressed as follows:

MR. RICHARD FARBER, Esq.
MR. JOHN SCHUMANN, Esq.
Attorneys Tax Division, Department of Justice
Post Office Box 502
Washington, D.C.

Date JAN. 20, 2009

Dr. Alvin S. Kanofsky

119

(3)

No. 08 – 0702

Supreme Court, U.S.
FILED
FEB 2 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DOM WADHWA, M.D., *pro se*
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

GREGORY G. GARRE, Esquire,
United States Solicitor General
JEFFREY A. GAUGER, Esquire,
Attorney for the Respondent
B. CHAD BUNGARD, Esquire,
Attorney for the Respondent
CALVIN M. MORROW, Esquire,
Attorney for the Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REQUEST FOR A REHEARING

DOM WADHWA, M.D., *pro se*
215 E Camden Avenue, H-13
Moorestown, NJ 08057
Telephone: (609) 220-2771 (cell)

SUPREME COURT OF THE UNITED STATES
1 First Street, N.E.
Washington, DC 20543

No. 08 - 0702, filed November 26, 2008

CERTIFICATION OF COUNSEL

U.S. Court of Appeals for the Federal Circuit
No. 2008, 3176-3177

DOM WADHWA, M.D., *pro se*
Petitioner

v.

Merit Systems Protection Board,
Respondent

I, Dom Wadhwa, M.D., *pro se*, a party unrepresented by counsel, hereby present my petition for rehearing of the above-entitled case in good faith and not for delay.

This petition distinctly states its grounds that are limited to other substantial grounds not previously presented and is accompanied by this certificate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 14, 2009

Dom Wadhwa MD

Dom Wadhwa, M.D., *pro se*
Petitioner

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APPENDIX

Exhibit A:

Letter to Petitioner from the Clerk of the Court for the Supreme Court of the United States ... App. 1

PETITIONER'S REQUEST FOR A REHEARING ON PETITION FOR A WRIT OF CERTIORARI

Introduction

I, Petitioner, Dom Wadhwa, M.D., *pro se*, ("Dr. Wadhwa") in the above-captioned Petitioner's Request For A Rehearing on Petition For A Writ Of Certiorari, Case No. 08-0702, respectfully files a motion with this Honorable Court for a rehearing (Court Rule Number 44) of the Court Order that was entered on January 12, 2009.[1]

Facts

The following facts should be taken into consideration:

1. The January 12, 2009 letter from the Clerk of the Court did not offer me an explanation for issuance of the court order

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[1] On January 12, 2009, William K. Suter, Clerk of the Court for the Supreme Court of the United States, issued a letter to Petitioner which states, "The Court today entered the following order in the above entitled case (Dom Wadhwa v. Merit Systems Protection Board, No. 08-0702): The petition for a writ of certiorari is denied."

that denied my petition for a writ of certiorari. **(Exhibit A)**

2. The Agency officials, with the help of their attorneys, have been successful in using their authority to dismiss my case in the lower courts without providing a shred of evidence to back up their argument.

Denying my petition for a writ of certiorari allows individuals with authority not to be held accountable for their actions.

3. I have been subjected to relentless, ongoing harassment in the workplace at the Philadelphia VA Medical Center ("PVAMC"), despite no wrongdoing whatsoever on my part.

John Murphy, M.D., Director of Primary Care and my first level supervisor, Michael Grippi, M.D., former Chief of Medicine and my second level supervisor, Margaret O'Shea-Caplan, Associate Medical Center Director, and Kathleen Craige, R.N., Nurse Manager at PVAMC, have made a concerted effort to subject me to this workplace harassment.

Denying my petition for a writ of certiorari allows these individuals with authority not to be held accountable for their actions, despite no wrongdoing whatsoever on my part.

4. Drs. Murphy and Grippi, Ms. O'Shea-Caplan, and Ms. Craige have brought false charges against me, for my alleged professional misconduct and for my alleged clinical incompetence, while I was exercising my civil rights under the Civil Rights Act of 1964.

Denying my petition for a writ of certiorari will allow the Agency officials at PVAMC not to be held accountable for misuse of authority for their prohibited personnel practices and this will allow them to continue to misuse their authority with other innocent individuals such as myself.

5. Drs. Murphy and Grippi, Ms. O'Shea-Caplan, and Ms. Craige have denied me my rightful access, under the Freedom of Information Act (FOIA)/Privacy Act, to the false documents related to the false charges brought against me for my alleged professional misconduct and my alleged clinical incompetence.

Denying my petition for a writ of certiorari will not hold these Agency officials, and other Agency officials at PVAMC, accountable for utilizing false documents against employees to humiliate and harass innocent victims such as myself.

4. There were several issues that were raised by Respondents for the Government, Jeffrey A. Gauger, Esquire, B. Chad Bungard, Esquire, and Calvin M. Morrow, Esquire, that are *inaccurate* and based on false information provided to them by Drs. Murphy and Grippi, Ms. O'Shea-Caplan, and Ms. Craige, Agency officials at PVAMC. Oral argument would have revealed the true facts in my case.

I was denied the opportunity by oral argument under oath to challenge these three attorneys, regarding the flawed motion they produced in order to dismiss my case at the lower level.

5. Furthermore, on July 26, 2006, three days after I had contacted the VA Office of the Inspector General (IG) regarding the unsafe working conditions in the Outpatient Primary Care Clinics at PVAMC, Dr. Murphy proposed a major disciplinary action against me of a Fourteen (14) Day Suspension for an alleged violation of the *Privacy Act*, which I did not, in fact, violate.

6. On August 30, 2006, eight days after the VA IG's Office notified Dr. Grippi of my protected disclosure, he rescinded Dr. Murphy's proposed Fourteen (14) Day Suspension and he (Dr. Grippi) issued a proposed Removal of me from my over twenty-two year employment with the VA for

the same *alleged* violation of the *Privacy Act*, which I did not, in fact, violate.

7. Significantly, the Agency officials at PVAMC refused to provide me with any evidence to support their proposed removal disciplinary action that I required to provide an adequate response to it. Rather, the Agency officials at PVAMC demanded both my oral and my written responses to this proposed major disciplinary action in less than eight days. [2]

Ultimately, the Agency officials at PVAMC have refused to pr vide me with the necessary documents essential for me to prove my innocence. I assert that the Agency officials do not have *any* documents *whatsoever* to back up their false charges against me and, therefore, they have steadfastly refused to provide these documents to me.

8. On August 30, 2006, I filed a formal complaint regarding the proposed removal disciplinary action issued to me by Dr. Grippi, Agency Case No. 2003-0642-2006103240. On September 15, 2006, the VA Office of Resolution Management (ORM)

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[2] Please note: The proposed removal disciplinary action was mitigated to a reprimand based not on conduct or performance and was issued to me on April 3, 2007. The Agency officials at PVAMC refused to offer me any explanation for this reprimand.

sent a letter acknowledging receipt of Agency Case No. 2003-0642-2006103240, filed on August 30, 2006. This Agency Case was never investigated by ORM. The Agency issued a Final Agency Decision for this EEO case in October 2006, allegedly based on my "failure to state a claim."

9. On October 15, 2006, I involuntarily transferred from PVAMC to the VA Northern Indiana Health Care System ("NIHCS"), where I was placed on administrative leave for *false charges* of alleged professional misconduct and alleged clinical incompetence at PVAMC, after only three workdays of employment at NIHCS.

10. . On December 19, 2006, William F. Feeley, VA Deputy Under Secretary for Health for Operations and Management, issued a Directed Reassignment Order for my return from NIHCS to PVAMC for my alleged professional misconduct and for my alleged clinical incompetence at PVAMC, prior to my transfer to NIHCS in October 2006.

It should be noted that in December 2006, Mr. Feeley **assumed** that the information provided to him about me by Drs. Murphy and Grippi and by Joseph Pomorski and by Nevin Weaver, two Agency officials at VA Central Office, was factual and truthful regarding my alleged professional

misconduct and my alleged clinical incompetence at PVAMC, prior to my transfer to NIHCS in October 2006.

Based on this assumption, Mr. Feeley issued the Directed Reassignment Order. Two months later, in February 2007, I was informed by Mr. Pomorski that Mr. Feeley's *Directed Reassignment Order was not due to my conduct or performance* at PVAMC. These conflicting statements by Mr. Pomorski in December 2006 and in February 2007 regarding my Directed Reassignment Order avoid the employment contract, avoid RIF (reduction-in-force) procedures and safeguards, and avoid appeal rights.

Also, it was assumed by Mr. Feeley that the Agency officials at PVAMC who issued the proposed removal disciplinary action against me had acted in good faith.

On the contrary, on August 30, 2006, Drs. Murphy and Grippi, Ms. O'Shea-Caplan, and Ms. Craige misused their administrative authority and used false documents to propose a major disciplinary action of removal from my over twenty-two year VA employment, for absolutely no wrongdoing on my part.

11. I have exhausted all administrative remedies prior to filing a petition for a writ of certiorari with this Honorable Court.

Exhaustion of administrative remedies is not a jurisdictional requirement, but rather a judicially created prudential requirement. It should be noted that I had made several attempts with my immediate supervisors and with the Agency officials at PVAMC to obtain the documents they had created in order to bring false charges of alleged professional misconduct and of alleged clinical incompetence against me.

Also, I contacted Agency officials at VA Central Office in Washington, D.C., to obtain this information. I was informed by the Agency officials at VA Central Office that my concerns were a local issue and that I would have to obtain the necessary documents from the Agency officials at PVAMC.

ARGUMENT

Erroneous Interpretation of Law, Regulation or Material Fact, or Misapplication of Established Policy

The United States Court of Appeals for the Federal Circuit erred by dismissing my claims against the Agency. The three attorneys for the Agency grossly distorted the law which resulted in an emasculation of my well-founded claims.

Charges made by the Agency officials at PVAMC of *alleged professional misconduct* and of *alleged clinical incompetence* by me as isolated incidents alone would not constitute discriminatory retaliatory harassment. However, when these charges are repetitive and they are on an ongoing basis, then they constitute acts of *reprisal* by the Agency for my previous and ongoing EEO activities, and constitute a hostile work environment.

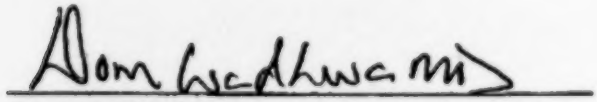
I have suffered injuries from these discriminatory acts of harassment. The Agency's refusal to address my legitimate and well-founded discrimination complaints as clear evidence of severe retaliatory or pervasive harassment and a hostile work environment has resulted in a *de facto* determination that I have not been subjected to harassment.

Conclusion

In summary, denial of my petition for a writ of certiorari implies that it is acceptable for individuals with administrative authority to misuse their power and, as a direct result, they will not be held accountable for their actions.

Therefore, I am respectfully filing Petitioner's Request For A Rehearing On Petition For A Writ Of Certiorari with this Honorable Court.

Respectfully submitted,



Dom Wadhwa, M.D., *pro se*
Petitioner

Dated: February 4, 2009

Petitioner's Home Address:
215 E Camden Avenue, H-13
Moorestown, NJ 08057
Telephone: (609) 220-2771 (cell)
email: dom.wadhwa@va.gov

Exhibit A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 12, 2009

Dr. Dom Wadhwa
215 E. Camden Avenue
H-13
Moorestown, NJ 08057

Re: Dom Wadhwa
v. Merit Systems Protection Board
No. 08-702

Dear Dr. Wadhwa:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

sd/
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
1 First Street, N.E.
Washington, DC 20543

No. 08 - 0702, filed November 26, 2008

CERTIFICATE OF COMPLIANCE

U.S. Court of Appeals for the Federal Circuit
No. 2008, 3176-3177

DOM WADHWA, M.D., *pro se*
Petitioner

v.

Merit Systems Protection Board,
Respondent

As required by Supreme Court Rule 33.1(h), I certify that *Petitioner's Request For A Rehearing On Petition For A Writ Of Certiorari* to the Supreme Court Of The United States contains 1,790 words, excluding the parts of the brief that are exempted by Supreme Court Rule 33.1 (d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 2009

Dom Wadhwa, M.D., *pro se*
Petitioner

SUPREME COURT OF THE UNITED STATES
1 First Street, N.E.
Washington, DC 20543

DOM WADHWA, M.D.,
Petitioner *(pro se)*

v.

Merit Systems Protection Board,
Respondent

Docket No.
08-0702
Filed:
November 26, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies (*three copies*) of the foregoing *Petitioner's Request For A Rehearing On Petition For A Writ Of Certiorari* to the Supreme Court Of The United States in the above matter were sent by first class mail, this date, to:

Solicitor General of the United States
Department of Justice
Room 5614
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Telephone: (202) 514-2203

Dom Wadhwa MD

Dom Wadhwa, M.D., *pro se*
Petitioner

Dated: February 4, 2009

SUPREME COURT OF THE UNITED STATES
1 First Street, N.E.
Washington, DC 20543

DOM WADHWA, M.D.,
Petitioner *(pro se)*

v.

Merit Systems Protection Board,
Respondent

Docket No.
08-0702
Filed:
November 26, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing *Petitioner's Request For A Rehearing On Petition For A Writ Of Certiorari* to the Supreme Court Of The United States in the above matter were served upon the following by first class mail, this date, to:

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Dated: February 4, 2009